

Operating Agreement

Between

The Washington State Department of Ecology
And
The U.S. Environmental Protection Agency, Region 10

For

The Washington State
Water Pollution Control Revolving Fund Program

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Definitions

A Federal Letter of Credit (FLOC) is a process in which funds are transferred electronically from the Treasury (through the Federal Reserve) to the Water Pollution Control Revolving Account.

A payment is the authorization that makes funds available for transfer from the established FLOC to the Water Pollution Control Revolving Account.

A cash draw is the transfer of monies from the FLOC to the Water Pollution Control Revolving Account.

A disbursement is the transfer of funds from the Water Pollution Control Revolving Account to a subrecipient.

A subrecipient is an eligible public body as defined in Chapter 173-98 WAC.

Introduction

Unless otherwise stated, the term “Fund” is used in this Operating Agreement to refer to the Water Pollution Control Revolving Account. The Fund is administered through the EPA, Washington State Water Pollution Control Revolving Fund (Revolving Fund), and the Washington State Department of Ecology (Department).

Description of the Fund

RCW 90.50A.020 established the Washington State Water Pollution Control Revolving Account in the Washington State Treasury. The state Office of Financial Management has classified this account as a “special revenue fund,” within a broader classification of Governmental Funds. This account was established pursuant to §603(a) of the Federal Water Pollution Control Act [33 U.S.C. §1383(a)], as amended, and Chapter 90.50A RCW.

The Fund functions as a special purpose lending institution, which offers financial assistance for water quality projects. These projects address Washington State’s highest priority water quality needs, such as water quality infrastructure and implementing pollution prevention strategies pursuant to §319 of the Federal Water Pollution Control Act and its Comprehensive Conservation and Management Plans for designated national estuaries in Washington State.¹

The Fund’s accumulated capital consists of capitalization grants awarded by the U.S. Environmental Protection Agency (the EPA), matching capital contributions provided by Washington State from the Water Quality Account and other sources at the discretion of the Washington State Legislature, and Fund earnings that are all, by law, deposited in the Fund. Capitalization grants started in 1988 and continue to this day (Federal Fiscal Year 2007). As of this writing, the EPA capitalization grants are expected to continue through the federal fiscal year (FFY) 2011.

Purpose of the Operating Agreement

This Operating Agreement establishes a contractual relationship between the U.S. Environmental Protection Agency (the EPA) and Washington State. The Agreement

¹ National Estuaries were designated under §320 of the Federal Water Pollution Control Act.

establishes the mechanisms and procedures by which Washington State and the EPA will work cooperatively to administer the Fund, which has been established by Chapter 90.50A RCW in accordance with the requirements of 33 U.S.C. §1383.

Goals: The EPA and Washington State

EPA goals for the Fund and Washington State's management of the Fund

1. Washington State should manage the Fund in a way that maximizes the water quality benefits that Washington State is obtaining from Fund-financed projects over time.
2. Washington State should use the Fund as an integral and major component of its overall system for financing water quality infrastructure. Washington State's Fund financing and lending strategies should be coordinated with other state and federal agencies, such as the Washington Department of Community Trade and Economic Development Public Works Trust Board and the U.S. Department of Agriculture's Rural Development Utilities programs.
3. Washington State should manage the Fund and its loan portfolio in a manner that ensures that its capital will be available in perpetuity to provide financial assistance to eligible water quality projects.

Washington State goals for the Fund:

1. To protect public health and water quality and to achieve overall improvement and protection of the environment.
2. To administer the Fund in a way that ensures financial integrity, viability, and long-term purchasing ability.
3. To assist financially distressed communities in meeting required public health and water quality standards.
4. To provide financial assistance to communities to achieve compliance with state and federal water pollution control requirements, implement nonpoint source pollution control programs, and develop and implement estuary conservation and management programs.
5. To maximize limited state and federal grant and loan dollars through the continued integration of the Fund with the Centennial Clean Water Program (Centennial) and the Federal Water Pollution Control Act Section 319 Nonpoint Source Program (Section 319), and other State water quality grant and loan programs.
6. To encourage local governments to develop and implement projects to prevent water quality degradation, including wetland protection projects.

Governing Law

This Operating Agreement has been developed within the framework established by the Federal Water Pollution Control Act in general (33 U.S.C.A. §1251 et. seq., "the Act"), title VI of the Act [33 U.S.C.A. §1381 et. seq.], and the Clean Water State Revolving Fund Program Regulations (40.C.F.R. Part 31). The Agreement is bound by any EPA² issued policy and guidance for the EPA Clean Water State Revolving Fund Program.

² In this context, "the EPA" includes EPA's national program offices (Headquarters) and EPA, Region 10.

Implementation

The current Operating Agreement, dated September 11, 1989, will remain in effect through June 30, 2008. This Operating Agreement will be effective on July 1, 2008. The effective date of subsequent Operating Agreements will be consistent with the Washington State Fiscal Year funding cycles.

In the event that relevant provisions of the Federal Water Pollution Control Act are amended by the United States Congress, the Department of Ecology (Department) and the EPA will revise or amend this Operating Agreement to implement any such amendments. Additionally, in the event that the Clean Water State Revolving Fund program is reauthorized by the United States Congress, the Department and the EPA will amend this Operating Agreement to implement any changes embodied in the new authorization. Similarly, when the EPA issues new or revised policy or guidance that necessitates a revision to this Operating Agreement, the Department and the EPA, Region 10 will develop appropriate revision(s).

When Washington State law or regulation is changed in a manner that warrants revisions to this Operating Agreement, the Department and the EPA, Region 10 will develop appropriate changes to the Agreement. Such Operating Agreement changes will be effective once they have been approved (signed) by the Director of the Department and the Regional Administrator of the EPA, Region 10. These changes will be implemented by the Department for the upcoming State Fiscal Year Funding Cycle.

Roles and Responsibilities

Washington State's Role

The Department, as the designated instrumentality of Washington State, has exclusive responsibility for management of the Fund and is the primary unit of state government with which the EPA will interact on the EPA Clean Water State Revolving Fund management topics.

- A. The Department is responsible for administering and developing Washington State regulations that govern the uses and limitations of the Fund. These regulations are published in Chapter 173-98 WAC. The Department is responsible for updating these regulations periodically as the Fund matures.
- B. The Department will develop and publish annual funding guidelines. These guidelines must comply with applicable Washington State and Federal law and regulations. These guidelines may be combined with other Department funding program guidelines and will be available on the Department's Web site.
- C. The Department will update the State Environmental Review Process (SERP) for the Fund as needed. The SERP is developed under the State Environmental Policy Act (RCW 43.21C) and the State Environmental Policy Act regulations (Chapter 197-11 WAC) and addresses the requirements articulated in the EPA's Clean Water State Revolving Fund Program regulations at 40 C.F.R. §35.3140. The SERP is incorporated by reference in this Agreement.
- D. The Department will develop and publish an annual Intended Use Plan (IUP) in accordance with the requirements articulated at 40 C.F.R. §35.3150. The proposed (draft) IUP will be subject to public review and comment.

The Final IUP will document all funds available to the Fund for the fiscal year and describe how Washington State intends to use available funds for that year. The IUP will demonstrate that all projects on the project priority list in the IUP are eligible to receive assistance in accordance with the eligibility criteria articulated in the Federal Water Pollution Control Act, the EPA Clean Water State Revolving Fund program regulations, and applicable provisions of the Revised Code of Washington and the Washington Administrative Code.

The Final IUP will be included, as an attachment, to any application to the EPA for a capitalization grant.

- E. The Department will employ an adequately sized program staff with the managerial, financial, environmental, and engineering skills necessary to meet its fiduciary obligations in the management of the Fund and meet the water quality and water quality infrastructure financial goals of the EPA Clean Water State Revolving Fund program in Washington State.

Environmental Protection Agency Role

- A. For as long as the U.S. Congress continues to appropriate funds for clean water state revolving fund capitalization grants, the EPA will continue to award such capitalization grants to the Department for the Fund for each year in which the Department submits a timely and approvable grant application. The EPA reserves the right to withhold any grant awards to Washington State if the EPA grant conditions are not met.

Such conditions include, but are not limited to, unresolved instances of noncompliance or failure to comply with the EPA Clean Water State Revolving Fund program policy on “timely and expeditious use” of the funds available in the Fund.

- B. The EPA will provide Letter of Credit (LOC) grant payments to Washington State in accordance with the schedule of LOC payments documented in each capitalization grant agreement. The schedule in the agreement will be taken directly from the schedule specified in the Intended Use Plan (IUP) supporting the capitalization grant application.
- C. In accordance with its general fiduciary duty for the EPA Clean Water State Revolving Fund program and its specific mandate at §1386(e) of the Act, the EPA will conduct oversight over the Department’s administration and management of the Fund. This oversight will be implemented in two ways:
 - a. Through continuous dialog with Department staff during the program year to address programmatic issues and questions as they arise.
 - b. Through an annual, oversight review carried out on a schedule developed in cooperation with Washington State. This review will result in the publication by the EPA of a Program Evaluation Report that documents the EPA findings and identifies any required corrective actions.
- D. The EPA will provide technical assistance and guidance to the Department. This technical assistance may include, among other services:
 - a. Training to Department staff and management.

- b. Assistance in designing and delivering training to potential water quality financial assistance applicants.
 - c. Advising the Department and other state government organizations and institutions about proposed changes in Washington State law or regulation affecting the EPA Clean Water State Revolving Fund.
 - d. Participation in Washington State-initiated advisory bodies such as the Water Quality Financial Assistance Advisory Council.
 - e. Advising the Department on program implementation questions when requested.
- E. The EPA will implement its oversight responsibilities in a manner that maximizes the flexibility available to the Department in its implementation of the EPA Clean Water Revolving Fund program and its administration of the Fund.
 - F. EPA discretion to maximize the flexibility allowed to Washington State is constrained by both the Congressional intent embodied in the Act (and in its authorization for the creation of the Fund) and by the language of the Act.

Assurances and Certifications

The Department, upon receiving its EPA capitalization grant, agrees to manage the Fund in accordance with this Operating Agreement; the terms of the grant agreements between the EPA and the Department; the Federal Water Pollution Control Act, as amended, Chapter 90.50A of the Revised Code of Washington (RCW); Chapter 173-98 WAC; and any other applicable laws, regulations, and guidance.

Instrumentality of Washington State

The Department, as a designated instrumentality of Washington State, is responsible for management of the Fund and will be the primary point of contact for working with the EPA on Fund matters. The Department is empowered by Washington State law to enter into capitalization grant agreements with the EPA, to accept capitalization grant awards made under Title VI of the Federal Water Pollution Control Act, and to otherwise manage the Fund in accordance with the requirements and objectives of Title VI of the Federal Water Pollution Control Act.

Agreement to Accept Payments

The Department will accept capitalization grant payments from the EPA in accordance with the negotiated payment schedule in the grant agreement. All capitalization grant payments will be deposited into the Fund.

Provide a Washington State Match

The Washington State Treasurer, as directed by legislative appropriation, will transfer into the Fund a matching capital contribution of either cash or a LOC, which equals 20 percent of each Federal grant payment on or before the date which Washington State receives the federal grant payment. When Washington State uses a LOC to effect its matching capital contribution, it shall deposit cash from that LOC equal to 20 percent of each cash draw from a capitalization grant payment into the Fund's account on or before the date of the cash draw.

Expeditious and Timely Expenditure

The Department will expend all funds in a timely and expeditious manner and in accordance with national EPA policy on the “expeditious and timely use of Revolving Fund Funds” (Policy Memo SRF 99-05). The Department will attempt to commit all funds for new loan assistance agreements within one year of the Department’s receipt of those funds. Funds are considered “received” as of the date on which a LOC payment is scheduled in a grant agreement or as of the date on which a loan payment (or interest on the Fund’s invested cash balance) is deposited into the state’s Revolving Fund account.

The EPA recognizes that Washington State operates under a biennial budget. The Washington State Legislature enacts a budget to appropriate funds every other year for a two-year period. The Washington State Legislature must appropriate funds before they can be committed to new loans. However, for the second year of each biennium, the Governor’s office typically submits a supplemental budget to the Legislature for its consideration. The Department will develop a Fund earnings forecast for the Governor to request the required appropriations from the Legislature for the biennium and, if needed, in the supplemental budget request.

State Laws and Procedures

The Department agrees to expend each quarterly LOC grant payment in accordance with the laws and procedures applicable to the commitment and expenditure of revenues of Washington State.

Washington State Accounting and Auditing Procedures

In administering the Fund in accordance with the requirements of §1386 of the Act and 40 C.F.R. §35.3165, the Department will use accounting, audit, and fiscal procedures that conform to generally accepted governmental accounting standards. Financial statements included in the Annual Report required by §1386(d) of the Act will be prepared in accordance with these generally accepted governmental accounting standards.

Recipient Accounting and Auditing Standards

The Department will require all local governments receiving assistance from the Washington Water Pollution Control Revolving Account to adhere to and maintain a system of accounting and reporting in accordance with RCW 43.09.200 “Local Government Accounting – uniform system of accounting” or another comprehensive basis of accounting as prescribed by the Office of the Washington State Auditor. In the event that the Washington Water Pollution Control Revolving Account provides assistance to private entities for eligible projects, the Department will require these recipients to maintain a system of accounting and reporting in accordance with generally accepted accounting principles of the Financial Accounting Standards Board (FASB).

Compliance with Environmental Review Requirements

The Department will require that each public body, receiving financial assistance for publicly owned treatment works projects, be subjected to an appropriate environmental review under the Washington State environmental review process (SERP) using the procedures articulated in Chapter 197-11 WAC, pursuant to Chapter 43.21C RCW.

Environmental Review Requirements

In order to ensure the requirements of the Endangered Species Act (ESA) as a federal Clean Water Act state revolving fund crosscutting authority are met, the Department will coordinate approval of facility plans with the EPA. The Department will ensure that the recipient provides documentation for compliance with the Endangered Species Act to be reviewed by the EPA and used for consultation with the services if necessary. If a Biological Assessment is required to comply with the ESA, the Department will direct the Revolving Fund assistance recipient to prepare it. The Department will forward the completed biological assessment to the EPA. The EPA will consult with appropriate federal services on the biological assessment. If the Services concur that the proposed project is "Not Likely to Adversely Affect" (NLAA) listed species or habitat the EPA will provide the Department and the recipient formal notification of the Service's concurrence. With notification of the services concurrence, the Department can then approve the Engineering Report as a Facility Plan, making that project eligible for a Revolving Fund loan.

If the services do not concur with the NLAA determination, EPA will consult with the Services and the recipient to resolve the issues and advise the Department of Ecology of the outcome of the consultation process.

Non Federal Representative

The Department and EPA will continue to work toward the Department's designation as EPA's non-Federal Representative for informal ESA consultation for revolving fund financed treatment works projects. The Department will evaluate the technical requirements to review Biological Assessments, the capacity required to support the government to government consultation relationship between the Department and the Services, and the staff commitment requirement necessary to support these consultation activities prior to committing to serving as the designated non-Federal Representative. Based on this evaluation the Department will determine whether the Department has the necessary technical capacity to function as EPA's non-Federal Representative for informal ESA consultation.

State Environmental Review Process

The Department's SERP process will be managed by rule (WAC 173-98-720), guidelines, and internal policy and procedure. The Department will ensure consistent application of these procedures across the state through internal review and technical assistance for the Department's regional staff.

Cost for Administering Environmental Review

The EPA recognizes that the Department manages its water quality financial assistance programs in a fully integrated manner. Furthermore, as the state's lead environmental agency, the Department exercises oversight over the facilities planning and environmental evaluation process for publicly owned treatment works projects regardless

of how the recipient intends to finance the construction of those projects.³ Given this set of circumstances the Department may decide to require a community to comply with the SERP and the federal cross-cutting authorities for its project in anticipation of the possibility that it may later be a candidate for assistance from the Washington Water Pollution Control Revolving Fund. The EPA would consider costs incurred to implement the SERP and the cross-cutting federal authorities for such projects to be costs appropriately incurred in administering the Fund.

Consistency with Planning Requirements

The Department will ensure that projects receiving financial assistance from the Fund are consistent with plans, if any, developed pursuant to §1285(j), §1288, §1313(e), §1329, and §1330 of the Act. The Department agrees to document that each project conforms to the applicable plans in the loan file maintained on each project.

Recipient Requirements

The Department will comply with and require all recipients to comply with applicable federal and Washington State statutes, regulations, and guidance. Applicable law and regulation includes those laws and regulations that are applicable by their own language, as well as those federal “cross-cutting” authorities identified in the EPA published guidance documents as being applicable to projects receiving assistance made directly available from the EPA capitalization grants (See 40 C.F.R. §35.3145 and the EPA Cross-Cutting Federal Authorities Handbook, dated October 2003). The current list of cross-cutting Federal authorities (with reference information) is published by the EPA Office of Groundwater and Drinking Water and is available on the Web at <http://www.epa.gov/safewater/dwsrf/xcuts.html>.

In accordance with the Washington Administrative Code, the recipient is responsible for compliance with applicable environmental laws, regulations, and executive orders. The Department will ensure that loan subrecipients are meeting their respective compliance obligations based on the Department’s review of project records maintained by the assistance recipient as well as the Department’s general oversight of each project.

Receipts and Earnings of the Fund

The Department will ensure that all funds earned on invested Fund assets as well as all principal and interest payments on loans made from the Fund shall be deposited in the Water Pollution Control Account within the Washington State treasury.

Financial Administration

Types of Financial Assistance

The Department will provide financial assistance for water quality projects in accordance with the types of assistance allowed by §1383(d) of the Act and the “uses of moneys” allowed by RCW 90.50A.030. Payment of program administrative costs will be in a manner consistent with the Act, financially sound and in accordance with WAC 173-98-030(1)(g).

³For example, a project may be financed by internally generated capital, publicly sold debt instruments, loans from the U.S.D.A’s Rural Utilities program or loans from the Washington State Public Works Board without any financing from Ecology’s financial assistance programs.

Capitalization Payments

The schedule of LOC payments for each capitalization grant will be based on the schedule provided in the Department's Final IUP for the fiscal year. LOC payments will be completed no later than the earliest of (a) eight calendar quarters after the grant funds are obligated by Washington State or (b) 12 calendar quarters after the grant funds are allotted to the state by the EPA. The EPA will not withhold payments unless Washington State fails to complete timely corrective action to a notice of noncompliance issued by the EPA pursuant to §1385(a) of the Act.

Cash Draws

Money will be transferred to the Washington Water Pollution Control Revolving Account from the U.S. Department of the Treasury in accordance with the EPA Washington State Clean Water State Revolving Fund Program Electronic Funds Transfer (EFT) system requirements. These cash draws will be made separately from other cash draws from the combined federal EFT transfers.

Disbursements

The Department will disburse funds from the Fund according to applicable state law, regulation, and procedure. Applicable state law, regulation, and procedures include:

- Chapter 90.50A RCW
- Chapter 173-98 WAC
- Administrative Requirements for Ecology Grant and Loan Recipients (Yellow Book, Publication 91-18)

Fund Administration

Staffing and Management

The Department will maintain staffing for the management of the Fund sufficient to:

- properly implement each of the duties associated with prudent Fund management
- properly oversee borrowers and their projects
- meet the Department's fiduciary obligation to protect the assets of the Fund and ensure timely repayment of all loans

Time spent on administering the Fund (and its loans) will be accounted for separately from time spent on administering other water quality financial assistance programs and projects, regardless of their sources of financing.

Audit Procedures

The Department will arrange for the completion of an independent separate audit of the program's financial statements each year in accordance with the "Environmental Protection Agency Audit Guide for Clean Water and Drinking Water Revolving Funds." Each fiscal year's audit should be completed and made available to the EPA within one year of the end of the state's fiscal year (FY).

The EPA will notify the Department within 90 days of its receipt of the separate audit of any concerns it may have with the audit or audit findings.

Fund Perpetuity

Pursuant to §1383(c)(3) of the Act, The Department will maintain a Fund balance that will ensure affordable funding for future water quality projects in perpetuity. The EPA and the Department agree that a practical indicator of the Department's success at offering affordable funding to public bodies for water quality projects in perpetuity is the degree to which purchasing power, as measured by a percent of tax-exempt municipal bonds, is being maintained. For Example:

The State of Washington defines Perpetuity as the point at which the Fund is earning at least fifty percent of the market rate for tax-exempt municipal bonds on its loan portfolio.

The Department will consider the following when establishing loan interest rates charged to public bodies:

- Portfolio yield
- Yield being earned by invested cash balances
- Long-term changes in wastewater and water infrastructure construction costs
- Bond market yields

Cash Management

In accordance with Washington State Law (RCW 43.88.160), all money deposited into the Water Pollution Control Revolving Account will be managed by the State Treasurer's Office. As required by §1383(d)(1)(d) and §1383(d)(6) of the Act, all payments of principal and interest on loans and all interest earned on the Fund will be credited to the Fund.

Intended Use Plan

The Department will develop and publish an annual IUP for all of the resources available to the Fund in accordance with the requirements of the applicable Washington Administrative Code (WAC) and the Water Quality Program Funding Cycle Guidelines for the current state fiscal year.

Public Participation

The Department will ensure public participation in the development of the annual Intended Use Plan in accordance with §1251(e) and §1386(c) of the Federal Water Pollution Control Act and 40 C.F.R. Part 25, and in any environmental reviews conducted under the EPA approved SERP.

Records

The Department will request project documents from financial assistance recipients. These documents, as well as all documents and records developed during the review, oversight, and management of each assistance project, will be stored in project files maintained by the Department. These records, as well as records developed by the Department in its administration of the Fund, will be retained in accordance with the

provisions of 40 C.F.R. §30.53 and 40 C.F.R. §31.42. Public access to these records will be provided in accordance with applicable provisions of Washington State law.

These records will be available for inspection and review to the EPA or any other federal government entity for any federal audit or review.


Congressional and Public Inquiries

Responses to Congressional and public inquiries about the Fund will be developed by the agency receiving the inquiry with the advice of the other agency. For example, if the EPA receives a Congressional inquiry, it will develop its response with Department advice.


Annual Review

The EPA and the Department will jointly plan the annual federal oversight review required by §1386(e) of the Federal Water Pollution Control Act. The two agencies will agree upon a schedule for this review after the EPA's receipt of the Washington State Annual Report required by §1386(d) of the Federal Water Pollution Control Act. The EPA will identify the documents and project files that it intends to review and the Department will make these records readily available.

After completing a document and file review, the EPA will develop a draft of its annual Program Evaluation Report (PER) and provide that draft to the Department for review and comment. After receiving Department comments, the EPA will revise the PER to reflect those comments and deliver the final PER to the Department before publishing it on the EPA, Region 10 Web pages for the Clean Water State Revolving Fund Program.


Jay J. Manning,
Director
Washington State Department of Ecology

Date: 9/23/08


Elin D. Miller,
Regional Administrator
Environmental Protection
Agency

Date: 10/20/08